

THE OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION

ADVANCE NOTICE OF PROPOSED RULEMAKING

This Advance Notice of Proposed rulemaking is being published to provide stakeholders an opportunity to send comments to the Office of the State Superintendent of Education prior to formal publication of the Notice of Proposed Rulemaking.

*As noted below, the invoice payment process is currently governed by a court order in *Petties v. D.C.* (Civ. Action 95-0148). The District will petition the court to end its oversight in this case, and is seeking to implement a seamless transition back to the District. To this end, the Special Court Master and plaintiffs' counsel have participated in the development of these rules. The rules are intended to replace the payment and dispute process set forth in the August 5, 2009 *Petties* court order governing payments to special education nonpublic schools and service providers and disputes that may arise. The opportunity to comment on this advance notice of proposed rulemaking ends on May 7, 2012.*

A Notice of Proposed Rulemaking will be published in the District of Columbia Register in May, providing further opportunity for public comment prior to final adoption of the rules. All comments received will be taken into consideration as part of the proposed rulemaking process prior to final adoption of these rules.

The State Superintendent of Education, pursuant to the authority set forth in sections 3(b)(8) and (11) of the State Education Office Establishment Act of 2000, effective October 21, 2000 (D.C. Law 13-176; D.C. Official Code § 38-2602(b) (11)) (Supp. 2011); sections 101 *et seq.* of the Placement of Students with Disabilities in Nonpublic Schools Amendment Act of 2006, effective March 14, 2007 (D.C. Law 16-269; D.C. Official Code §§ 38-2561.01, *et seq.*) (Supp. 2011); Mayor's Order 2007-149 (June 28, 2007); hereby gives notice of her intent to adopt a new Chapter 29, Subtitle A, of Title 5 of the District of Columbia Municipal Regulations (DCMR) entitled "Invoice Processing for Nonpublic Special Education Schools and Programs and Related Services Providers Serving Students with Disabilities Funded by the District of Columbia," and to amend Chapter 28, Subtitle A, of Title 5 of the DCMR entitled, "Certificates of Approval for Nonpublic Special Education Schools and Programs Serving Students with Disabilities Funded by the District of Columbia in not less than thirty (30) days from the date of publication of this notice in the D.C. Register. The proposed adoption of new chapter 29 establishes procedures related to the payment of invoices submitted by nonpublic special education schools, or programs or related service providers and establishes a process for invoice disputes.

The invoice payment and dispute process set forth in this proposal seeks to align with the procedural protections established by the August 5, 2009 court order in *Petties v. District of Columbia* (Civ. Action 95-0148). *Petties* plaintiff's counsel and the Special Court Master have participated in the development of this proposal. The rates for services subject to the invoice payments envisioned in these proposed regulations are based upon the annual rates established by OSSE pursuant to chapter 2800 of this title. The invoice dispute process will be conducted before the Office of Administrative Hearings. Following the opportunity for public comment, these rules will be finalized and will become effective in not less than 30 days. Public notice of effective date for implementation of these rules will align with a billing cycle based on the 5th or

15th day of the month. These rules are intended to replace the August 5, 2009 Payment Order entered by the U.S. District Court in the *Petties v. D.C.* case and will implement these rules after the Order is suspended or vacated.

Chapter 29 “Invoice Processing for Special Education Providers Serving District of Columbia Children with Disabilities Funded by the District of Columbia”, Subtitle A, Title 5 of the DCMR is proposed as follows:

**2900 INVOICE PROCESSING FOR SPECIAL EDUCATION PROVIDERS
SERVING DISTRICT OF COLUMBIA CHILDREN WITH DISABILITIES
FUNDED BY THE DISTRICT OF COLUMBIA**

- 2900.1 OSSE shall be responsible for processing all payments for services provided to children with disabilities attending nonpublic special education schools or programs and other providers as authorized by the District of Columbia.
- 2900.3 The rules in this chapter shall apply to all payments and disputes between OSSE, LEAs, and providers authorized to receive payments for services pursuant to Title 5, Subchapter A, Chapter 28 of the DCMR.
- 2900.2 An LEA shall be responsible for payments of authorized services to its students, provided that DCPS shall also be responsible for payments for authorized services provided to students attending a public charter school that has elected DCPS to serve as its LEA for special education purposes pursuant to D.C. Official Code § 38-1802.02(19).
2900. 4 OSSE and the LEAs shall post on their websites information about submission of invoices, including where invoices must be sent, verification of the receipt of invoices, the process related to invoice disputes and contact information with regard to these matters.

2901 INVOICE SUBMISSION

- 2901.1 A provider seeking reimbursement for authorized services, shall submit to OSSE or an LEA as appropriate, invoices for special education services in conformance with the special education service rates and procedures established by Chapter 28, Subtitle A, Title 5 of the DCMR.
- 2901.2 Payments of invoices shall be limited to the services specified and authorized in a student’s Individualized Education Program (IEP), a Hearing Officer Determination (HOD) resulting from an Individuals with Disabilities Education Act (IDEA) due process hearing, a court order regarding the student’s special education needs, or a service approved in writing by OSSE or the responsible LEA. A settlement agreement (SA) shall be accepted as authorization for payment unless it violates applicable federal and local laws and regulations.
- 2901.3 Invoices shall be processed for payment based upon the invoice processing date,

as defined in section 2999, herein.) For example, if an invoice is received on March 3, it will be processed as if received on March 5, and undisputed amounts must be paid by April 5. If an invoice is received on March 6, however, it will be processed as if received on March 15, and undisputed amounts must be paid by April 15. Finally, if an invoice is received on March 16, it will be processed as if received on April 5 and undisputed amounts must be paid by May 5.

2901.4 Invoices shall be submitted by mail or hand-delivery to OSSE or the LEA responsible for payment. An invoice shall be date stamped the same date received by OSSE or the LEA and, upon contemporaneous request, receipts shall be provided for hand-delivered invoices.

2901.5 An invoice shall include the following information:

- (a) Student name, date of birth, and the unique student identification number if one has been assigned;
- (b) The name of the District of Columbia agency responsible for placing the student at the nonpublic special education school or program;
 - i. The responsible agency for day nonpublic special education schools and programs and related service providers is the LEA that placed the student at the school or program or with the provider for IDEA services;
 - ii. For residential nonpublic special education schools and programs there may be more than one (1) responsible agency. Such agencies may include the Department of Youth Rehabilitation Services (DYRS), the Child and Family Services Agency (CFSA), and the Department of Mental Health (DMH);
- (c) The name of the LEA responsible for ensuring a free appropriate public education (FAPE);
- (d) The tuition rate per diem consistent with this chapter;
- (e) The number of tuition days billed for on the invoice;
- (f) Specific itemization of related services provided, including the frequency of each service and the unit of service provided on a per hour or per diem basis as appropriate;
- (g) The student's Medicaid number (if the student is approved for Medicaid), if provided by the parent or the sending LEA; and
- (h) An attendance report, including specific days of attendance and absence, the latter of which are identified as excused or unexcused. All absences will be presumed to be unexcused unless otherwise indicated.

- 2901.6 The following information shall be submitted for Medicaid recovery to the unit designated by OSSE or the LEA as appropriate:
- (a) date of service delivery;
 - (b) type of services (e.g., speech, occupational therapy, physical therapy, counseling, psychology);
 - (c) duration of services (e.g., forty (40) minutes, sixty (60) minutes, etc.);
 - (d) therapy modality (e.g., group or individual);
 - (e) dated and signed notes of one to two sentences in length that document the degree of measurable progress toward student treatment goals and objectives;
 - (f) the most recent available copy of the student's IEP currently in effect, if not previously provided. If the IEP is revised, a copy of the most recently available revised portion must be submitted within thirty (30) days or upon submission of the first invoice in which the revised IEP services are billed, whichever occurs first; and
 - (g) dates of the student's presence and absence in school.
- 2901.7 The annual and per diem tuition and related services rates shall be published on the OSSE website at <http://www.osse.dc.gov> on at least an annual basis. In the case of tuition and related services for which there are no published rates pursuant to Title 5, Subtitle A, Chapter 28, Section 2845.1 of the DCMR, a nonpublic special education school or program or related service provider providing services shall obtain from OSSE or the appropriate LEA, a written rate confirmation pursuant to Title 5, Subtitle A, Chapter 28 of the DCMR prior to submission of an invoice. Should OSSE fail to respond within seven business days of a provider's request for a written rate confirmation, the provider may provide services and then invoice OSSE for payment.
- 2901.8 A provider shall not submit an invoice based upon a bundled or packaged rate methodology when invoicing the District of Columbia government, unless:
- (a) Pursuant to Title 5, Subtitle A, Chapter 28 of the DCMR, OSSE has accepted the per diem rate established by another state, or political subdivision within a state, based upon a rate setting methodology that has been deemed reasonable by OSSE; and
 - (b) The bundling of related services within the rate submitted to OSSE is permitted or required by that state or political subdivision.
- 2901.9 Invoices submitted more than six (6) months after the date the services were provided shall not be accepted unless specifically approved by, and at the discretion of, OSSE or the responsible LEA.

- 2901.10 A nonpublic special education provider determined to have charged a duplicative fee or a fee in excess of a rate approved under Title 5, Chapter 28 shall be held responsible for reimbursement of such funds to OSSE or the LEA paying the invoice.
- 2901.11 Consistent with Title 5, Chapter 28, an independent related services provider may not invoice OSSE directly unless services are specifically mandated by an I.E.P., settlement agreement, HOD or court order.
- 2901.12 A third party service provider that subcontracts with a nonpublic special education school or program or related services provider shall do business with the LEA regarding costs of services and may not bill OSSE directly, unless specified by an I.E.P., settlement agreement, HOD or court order.
- 2901.13 A provider may not invoice OSSE for services associated with any form of homebound instruction without proof of prior written approval from the responsible LEA and OSSE. OSSE shall determine the applicable rates for such services on case-by-case basis for each individual student.
- 2901.14 A provider may invoice solely for special education and/or related services, specified in a student's IEP, HOD, or court order or a service approved in writing by OSSE or the LEA paying for a service.
- 2901.15 The first billing day for a student shall be the first full day of attendance at the nonpublic special education school or program or the first day related services are provided by a related services provider.
- 2901.16 A nonpublic school or program shall provide a copy of any invoice submitted to OSSE to an LEA upon request.

2902 PAYMENT OF INVOICES

- 2902.1 Payments of undisputed amounts shall be made on the 5th or 15th day in the month following the corresponding invoice processing date of the prior month. When the 5th or 15th is not a business day, the due date shall be the first business day thereafter. Payments shall be made by automated clearing house (ACH) electronic transfer and to the extent practicable, shall include identifying payment information.
- 2902.2 Alternative arrangements for receipt of payment may be established by mutual written agreement of the parties. If a provider's request for an alternative payment arrangement is denied, that provider may petition OSSE or an LEA for an exception. In seeking such an exception, the provider shall submit the reasons for such a request, including evidence that the absence of an alternative arrangement will pose a substantial risk of harm to the provision of services to its students.

2903 REFUNDS FOR OVERPAYMENT OR PREPAYMENT OF SERVICES

2903.1 A provider shall issue a pro-rated refund, or credit upon mutual written agreement with OSSE or the responsible LEA, for any overpayments or prepayments related to a student's placement.

2903.2 If OSSE or an LEA seeks a refund for an overpayment, it must notify the provider that it has 30 days to dispute the charge or pay the undisputed amount. After expiration of 30 days, OSSE or the responsible LEA has 75 days within which to request a hearing before the OAH to obtain a refund.

2904 DISPUTE NOTIFICATION AND FINAL DISPUTE DECISION

2904.1 OSSE or an LEA shall dispute an invoice for services, or the adequacy of the information provided, by transmitting a dispute notification electronically, by facsimile, by hand delivery or by mail, not later than the 5th or 15th day of the month after the corresponding invoice processing date as defined in section 2999 herein.

- 1) For example and as noted above, if an invoice is received on March 3, it will be processed as if received on March 5, and the undisputed amount must be paid in full by April 5; if OSSE or the LEA, disputes all or a portion of that invoice the dispute notice must be filed by April 5. If an invoice is received on March 6, it will be processed as if received on March 15. The undisputed amount of the invoice shall be paid in full by April 15. If OSSE or the LEA dispute all or a portion of that invoice the dispute notification to the provider is due by April 15. Finally, an invoice received on March 16, shall be processed as if received on April 5, and the undisputed amount of that invoice is due to be paid to the provider by May 5.
- 2) Receipt of a dispute notification is deemed to be effective the date the notification is delivered to the provider, or three days after the postmark in the event a dispute notification is mailed. The dispute notification constitutes the final dispute decision by OSSE or the LEA.

2904.2 The dispute notification shall include the following information:

- (a) A detailed description of the basis for the dispute, including documentation and policies relied upon.
- (b) The name(s) of the student(s).
- (c) Identification of the specific service(s) being disputed.
- (d) Date(s) of the service(s) being disputed.
- (e) The amount of the dispute.
- (f) The invoice identification number and payment due date of the 5th or 15th day of the month.

- (g) Documentation to support a dispute shall include as appropriate: a cost sheet, identification of IEP, hearing officer decision (“HOD”), Court Order, settlement agreement, policy and/or other administrative documentation: a copy or description of the relevant portions of such documents. The provider may request that complete copies of such documents be furnished if necessary for full consideration of the issues in dispute.
- (h) A dispute notification shall notify the provider of the procedures that the provider must follow in order to object to the dispute, including the provider’s right to seek a hearing before the OAH no later than 75 calendar days of the invoice processing date. The notification shall also include contact information for requesting a hearing before the OAH.

2904.3 The parties may seek to resolve disputes informally at any time.

2905 HEARINGS

2905.1 A provider may file a written request for a hearing before the OAH within 75 calendar days after the invoice processing date seeking payment and interest for an invoice that has either been disputed or has not been paid within the timeframes set forth in this chapter.

2905.2 In the event that a dispute notification is not issued timely, a provider may seek payment and appropriate relief, including such relief as provided in section 2906 of these rules, from the OAH by filing a hearing request within 120 calendar days after the invoice processing date as defined in section 2999 herein.

2905.3 All documents filed in the OAH proceeding as pleadings or exhibits shall protect student and family confidential information consistent with applicable federal and District of Columbia laws and regulations.

2905.4 Prior to a hearing being scheduled, all parties shall attend mediation at OAH, unless an administrative law judge determines that mediation is unnecessary or futile, notwithstanding any rules to the contrary.

- 1) OAH shall make reasonable efforts to hold mediations and/or hearings within forty-five (45) calendar days of receiving the request for a hearing, unless the law requires otherwise, or parties to a case stipulate otherwise.
- 2) OAH shall schedule requests for hearings for mediation to be conducted by an Administrative Law Judge in an effort to assist the parties in resolving such matters without a hearing. OAH shall provide written notice to all parties, which states the time, place and issues to be mediated pursuant to D.C. Official Code § 2-509(a).
- 3) In the event the parties are unable to reach a settlement of their disputes during mediation, OAH shall schedule a hearing.

- 2905.5 The procedural rules of the OAH shall apply to all dispute hearings and proceedings. *See* DCMR Chapter 2800, *et seq.*
- 2905.6 Consistent with District of Columbia laws and regulation, a final decision of OAH may be appealed to the District of Columbia Court of Appeals.

2906 REQUESTS FOR RELIEF

- 2906.1 OAH may award interest to the provider calculated from the date the payment was due, and in an amount consistent with the interest rate established by the Quick Payment Act of the District of Columbia.
- 2906.2 A provider may seek an interim payment of part of or the entire disputed amount if the OAH finds that a failure to pay such amount will imminently jeopardize the provision of services. Such a determination shall be made pursuant to the evidentiary standard of Sup. Ct. Civ. R. 65. The OAH may order that any monies found not owing be promptly repaid to the District of Columbia, with interest in an amount consistent with the interest rate established by the Quick Payment Act of the District of Columbia.
- 2906.3 The OAH shall make a determination of any amounts owed, either disputed or undisputed, and order a time frame for payment. The OAH may order payment of any undisputed portions of an invoice during the pendency of a dispute.

2907 CONTRACTS

- 2907.1 OSSE or an LEA responsible for special education and related services payments may, enter into a contract with a nonpublic special education school or provider or related services provider that contain invoice processing terms other than those set forth in these rules.

2908 MONTHLY REPORTS

- 2908.1 OSSE and a responsible LEA shall take reasonable steps to produce monthly invoice payment and invoice dispute reports.

2909 TIME FRAMES

- 2909.1** All time periods referenced by these rules shall be computed pursuant to Rule 6 of the District of Columbia Superior Court Rules of Civil Procedure.

2999 DEFINITIONS

All definitions in this section shall be in conformance with Individuals with Disabilities Education Act, approved November 29, 1975 (P.L. 94-142; 90 Stat773; as amended, 20 USC § 1400 *et seq.*, and regulations including 34 CFR Part 300 *et seq.*

Local education agency (LEA) means a public authority as defined in 34 CFR 300.28, including District of Columbia Public Schools and a District of Columbia public charter school acting as an LEA for purposes of a students' special education services, opting to participate in this payment process.

OSSE means the District of Columbia Office of the State Superintendent of Education.

Provider means a nonpublic special education school, program, related services provider or parent who is authorized by OSSE or an LEA or by an IEP, HOD, settlement agreement or court order to receive payments or reimbursements in connection with services specified in a student's IEP.

HOD means a decision issued by a hearing officer in a due process hearing under the Individuals with Disabilities Education Act.

Invoice processing date means the date on which an invoice is deemed to be submitted for payment based upon receipt of the invoice by the 5th or the 15th day of the month following the month during which services were provided. If the 5th or 15th is not a business day, the first business day following the 5th or 15th shall be deemed the date for invoice submission and processing. Invoices received after the 5th will be processed with invoices received before the 15th of the month and invoices received after the 15th will be processed on the 5th of the following month. .

Section 2833.2 of Title 5, subtitle A, chapter 28, will be deleted upon the effective date of the rules.

Persons wishing to comment on this advance notice of rulemaking should submit their comments in writing including or through an electronic submission to: Office of the State Superintendent of Education, 810 First Street, N.E., 9th Floor, Washington, D.C. 20002, or to Jamai.Deuberry@dc.gov with subject "Attn: Jamai Deuberry, Invoice Payment Rules." All comments to the advance notice of proposed rulemaking must be received by OSSE not later than May 7, 2012. All comments received will be taken into consideration during the proposed rulemaking process prior to final adoption of these rules.